

JAN 22 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BONFACIO RIOS-REYES,

Defendant - Appellant.

No. 06-50373

D.C. No. CR-05-01712-JSR

MEMORANDUM *

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Bonfacio Rios-Reyes appeals from the 57-month sentence imposed following his guilty-plea conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

§ 1291. We vacate the sentence and remand for resentencing.

Rios-Reyes objected in district court to the enhancement of his sentence based on the district court's finding that he was deported subsequent to a prior felony conviction. Because the fact of the subsequent removal was neither admitted by Rios-Reyes pursuant to his guilty plea nor proven to a jury beyond a reasonable doubt, we agree that the enhanced sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir. 2006). Further, because the record does not contain overwhelming and uncontroverted evidence establishing the subsequent removal, *see United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006), we cannot conclude that the error was harmless beyond a reasonable doubt. We therefore vacate the sentence and remand for resentencing. *Cf. United States v. Salazar-Lopez*, 506 F.3d. 748, 753 (9th Cir. 2007).

SENTENCE VACATED and REMANDED.